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Brief of Payson for Appellant.

Supreme Court

OF THE UNITED STATES.

Filed Dec. 23, 1898.

OCTOBER TERM, 1898.

No. 119.

M. J. NUGENT, SUPERINTENDENT OF THE TERRITORIAL PRISON, OF THE TERRITORY OF ARIZONA
Defendant and appellant.
vs.
THE STATE OF ARIZONA IMPROVEMENT COMPANY,
Plaintiff and appellee.

Brief for Appellant.

CHARLES F. AINSWORTH,
Attorney General for Arizona,
and L. E. PAYSON,
of Counsel for Appellant.

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IN THE

Supreme Court

OF THE UNITED STATES.

2 OCTOBER TERM, 1898.

THE STATE OF ARIZONA IMPROVEMENT COMPANY,
Plaintiff and appellee.
vs
M. J. NUGENT, SUPT. TERRITORIAL PRISON,
3 Defendant and appellant.

BRIEF FOR APPELLANT.

This action was commenced in the District Court of the Third Judicial District of Arizona in Yuma County by the appellee, The State of Arizona Improvement Company against the appellant, M. J. Nugent, as a Territorial officer, viz. Superintendent of the Territorial Prison, of

4 Arizona, to compel by mandamus the specific performance on the part of the Territory of Arizona, a certain contract, bearing date December 2nd, 1895; which had been entered into by and between the Territory of Arizona, through its officers the Board of Control and the appellee herein, said contract being set out in full in the record hereof at folios 7 to 26 inclusive.

The particular portion of the contract sought
5 to be enforced by these proceedings as alleged in appellee's petition, is that there be furnished the appellee ten able bodied male convicts out of the Territorial Prison at Yuma, properly guarded on the outside of the gate of the Territorial Prison. (Record folio 4, page 2.)

The trial court decided the case on the pleadings without the introduction of any evidence by either party, and granted the peremtory writ of mandamus, commanding and directing
6 M. J. Nugent, Superintendent of the Territorial Prison, to furnish the appellee ten able bodied male convicts out of the Territorial Prison at Yuma, properly guarded, on the outside of the gate of the Territorial Prison at Yuma. (Record folios 47 and 48, page 21.)

From this judgment an appeal was taken to the Supreme Court of the Territory and by that Court affirmed. (Record folios 64 ½ to 66,

page 28.)

The case now comes before this Court on appeal from the final decree of the Supreme Court of Arizona.

Before making a statement of case that the Court may understand the situation of the parties and their acts which lead up to this litigation, we herewith set out the Act of the Legislature under which the contract in controversy is alleged to have been made and the political changes in the chief executive of the Territory prior to the commencement of this action.

In 1895 the Legislature of Arizona passed what was known as the Board of Control Bill, being Act No. 19 of the 18th Legislative Assembly, approved March 8th, 1895, being as follows:

AN ACT. No. 19.

To create a Territorial Board of Control for the Charitable, Penal and Reformatory institutions, and making an appropriation therefor.

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. All Boards of Commission for the Insane Asylum, the Territorial Prison, and the Reform School, are hereby abolished, and shall go out of office and cease to discharge their respective duties on and after the passage of this Act.

10 SEC. 2. On and after the passage of this Act the Governor and Auditor of the Territory and one citizen who shall be appointed by the Governor with the advice and consent of the Council, and who shall hold his office for two years, and shall be ex-officio Secretary, shall constitute a Board of Control who shall have full charge of all charitable, penal and reformatory institutions that now exist in the Territory or that may hereafter be created; not more
11 than two members of said Board shall belong to the same political party.

SEC. 3. Said Board shall formulate rules for the governing of said institutions and shall purchase all supplies for the same, and all purchases exceeding one hundred dollars in amount shall be advertised for and let to the lowest responsible bidder; provided, that in cases of emergency private purchases may be made not exceeding in amount one hundred dollars for
12 any one institution.

SEC. 4. The Governor shall be allowed no compensation for any services rendered as a member of the Board of Control. The other member of said Board provided for in this act shall receive a salary of eighteen hundred dollars per annum and actual traveling expenses incurred in the discharge of his duties, to be paid quarterly out of the Treasury and he shall

devote his whole time to the discharge of the duties devolved upon him by this Act; provided, that before entering upon the duties of his office he shall give a good and sufficient bond in the sum of ten thousand dollars conditioned on the faithful discharge of his duties, such bond to be approved by the Governor. All bills for salary, clerk hire and expenses shall be paid quarterly, and it is hereby made the duty of the Auditor to audit said claim and draw a warrant on the Treasury for the same.

SEC. 5. The Auditor shall hereafter receive a salary of eighteen hundred dollars per annum and actual traveling expenses while in the discharge of his duties, which shall be in full for his services as Auditor and member of the Board of Control.

SEC. 6. Said Board shall be provided with an office at the Capitol of the Territory, which shall be in the Auditor's office and shall hold thereat regular meetings at least once in each month for the transaction of business, and shall be furnished with all necessary furniture and stationery, and all necessary blanks and blank books for the proper discharge of their duties not to exceed two hundred and fifty dollars per annum. Said Board shall make a full and detailed report of the expenses of each separate

institution to the Governor together with an itemized statement of individual expenses incurred while in discharge of their several duties as members of said Board, on or before the 31st day of December in each year, who shall lay the same before the Legislature at its next session, together with an approximate estimate of the cost of maintaining each separate institution for the then ensuing two years. Said Board shall also have the power to appoint a Clerk for the said Board of Control who shall receive a salary of seventy-five dollars ($75) per month.

SEC. 7. All accounts for clerk hire, salary and disbursements provided for in this Act shall be rendered under oath, and audited and allowed by the Board and paid on an order of the Auditor, drawn on the Treasurer at the end of each quarter.

SEC. 8. All powers and duties now devolved on any of the various Boards for the government of the Insane Asylum, Territorial Prison and Reform School, or required to be performed by them under existing laws, are hereby conferred upon the Board of Control created by this Act, and it is hereby made the duty of the Board of Control, created by this Act, to perform all duties required of said Board by existing laws and also to visit all the institutions hereby placed under their control at least once

every three months, and make a thorough inspection thereof, and from time to time formulate such rules and regulations for the government of the same, as they may deem advisable.

SEC. 9. Said Board of Control after qualifying and entering upon their duties, shall have full control over the Territorial Insane Asylum, the Territorial Reform School and Territorial Prison, together with all properties, buildings and lands belonging thereto or that may hereafter be acquired. Sixty days after the passage of this Act they shall have the power and authority to enter into an agreement or agreements with a responsible person or persons, to lease on shares or for cash the property, buildings and lands or any part thereof now belonging to the Territory, wherever said buildings and lands may be located, or that may hereafter be acquired for the purpose of furnishing employment for the inmates of the said Territorial Prison and the said Territorial Reform School. The said Board shall have the authority to contract with responsible person or persons, to furnish the labor of the inmates now within the said Reform School or said Prison, or that may hereafter be confined therein, or any number of them, for the best interests of the Territory; provided, however, that at no time shall the

labor of the inmates of the said Territorial Prison or Territorial Reform School be leased to any person or persons when the labor of the inmates of said institution is required upon any building or properties of the aforesaid institutions, and no lease or contract shall be made that will obligate the Territory to furnish tools, machinery or money, or make other expenditure other than the labor of the inmates, properly clothed and fed, and the proper guards for same, together with the use of the property, buildings and lands heretofore mentioned: provided, that no contract or lease shall be made to extend for a term of more than ten (10) years from the time of making said lease or contract. And the said Board may contract to allow such labor to be performed at any place either inside or outside the prison walls or the confines of the Reform School, but if a contract be made to allow labor to be performed outside of the prison walls or confines of the Reform School, it must be done under proper restrictions, having regard for the safety of the prisoners or inmates. A good and sufficient bond must be given by the person or persons leasing the labor of inmates of the aforesaid institutions for the faithful performance of such contract: said bond to be approved by the Board of Control.

SEC. 10. A sum of money sufficient to carry

out the provisions of this Act is hereby annually
25 appropriated out of the General Fund.

SEC. 11. All Acts and parts of Acts contravening or conflicting with the provisions of this Act are hereby repealed.

SEC. 12. This Act shall take effect and be in force from and after its passage.

A. J. DORAN, President. J. H. CARPENTER, Speaker.

Approved this 8th day of March, 1895.

26 LOUIS C. HUGHES, Governor.

That thereafter, The Territory of Arizona on December 2nd, 1895, through its Board of Control, entered into the contract with appellee, set out in the record at folios 7 to 26 inclusive, and by the terms of which the Territory of Arizona attempted to lease to the appellee herein, 2115 acres of land, also all the labor of the male convicts, then in the Territorial penitentiary, or which may thereafter be confined therein, for the term of ten years from the date of said contract and lease, said appellees to have the exclusive control of the labor of the convicts in the Territorial Prison from 8 o'clock a. m. to 5 o'clock p. m. during said term of ten years, Sundays and legal holidays excepted, the Territory to furnish said convict labor to the appellees herein whenever and wherever

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designated by said appellees in Yuma County, Arizona, properly guarded, clothed and fed, ready to commence work at the hours and terms above mentioned. Also to guard said convicts during the hours of labor, the Territory guaranteeing that said convicts shall perform good days labor while working to the satisfaction of the appellees herein, also when the work required to be performed should be too great a distance from the prison to admit the convicts returning to the prison at night, then they were to be guarded near the work by the Territory, and to furnish such convicts in such numbers, not less than five as might be required by the appellees herein from time to time. It being provided that the lease for the land should not commence until water should be conducted on the lands of the Territory so leased by the canal of the appellee, provided that said lease should commence to run within four years from its date. It was also expressly understood and agreed that the continuance and maintenance of said contract by the Territory during its entire term should be of the essence thereof, and that the right and privileges which accrue to the Territory thereunder, should be subject to and contingent upon its full, entire, faithful performance and should be forfeited and defeasible in the event of any substantial, per-

sistent or wilful breach thereof. That the
31 rental for the lands should be paid for in cash to be thereafter determined, or by one half the annual crops raised thereon at the option of the appellee herein: the convict labor to be paid for at the rate of seventy (70) cents per day payable in water rights in the canal, when such canal should be completed, at the rate of $20 per acre, said water right to be in the form when issued as set out in Exhibit "A," Record folios
32 17 to 25 inclusive, that as soon as $1,600 had been earned by said convict labor at 70 cents per day water right certificates convertable into water right deeds should be issued in form as per Exhibit "B." (Folio 26, page 11. Record.)

Appellee in no way agreeing to do anything on its part except as above set forth. After the execution of the contract aforesaid, there was a change in the Governor of Arizona, Gov. Franklin succeeding Gov. Hughes, and on April 22nd
33 1896 the time for commencing work on the aforesaid contract was extanded until June 10, 1896. (Record page 8.) Since which time all of the Territorial officers have been changed including the Superintendent of the Territorial Prison. It was during the administration of Governor Franklin that this action was commenced, it being his orders and direction that the Territory should not enter upon the per-

formance of said contract on its part for reasons
34 that will hereafter more fully appear. Hence this action at the very outset to compel specific performance on the part of the Territory.

STATEMENT OF THE CASE.

The first issue in this case arose upon the demur of the defendant and appellant herein to the complaint and petition of the plaintiff.

The petition of the complainants, The State of Arizona Improvement Company, alleged that
35 it was a corporation duly organized, and existing under the laws of the Territory of Arizona and that the defendant, M. J. Nugent was a resident of Yuma, Arizona and was the Superintendent of the Territorial Prison at Yuma, Arizona.

That he had full charge and control of persons confined in said prison subject only to the Board of Control of the Territory.

That the complainants entered into a contract
36 about Dec. 2nd, 1895, with the Territory of Arizona through its Board of Control.

That on the —— day of April, 1896 they entered into a supplemental contract with said Territory through its Board of Control, which contract and supplemental contract were set out as Exhibits "A," and made a part of the complaint.

Alleges that the Board of Control had

authority to make the contract on behalf of the
37 Territory.

That on the 2th day of May, 1896 the complainants made a demand in writing on N. J. Nugent, Superintendent of the Territorial Prison aforesaid in pursuance of said contract, to furnish to complainants on the 2nd day of June, 1896 at 8 a. m. ten able bodied male convicts out of the Territorial Prison at Yuma, properly guarded, on the outside of the gate of
38 the Territorial Prison at Yuma.

That on the 26th day of May, 1896 said M. J. Nugent served written notice on the complainant, peremtorily declining to furnish said convict labor at the time and place or at any time and place.

And alleging further that the complainant had no plain, speedy or adequate remedy in the ordinary course of law. (Record, folios 4 to 26 inclusive.)

39 To the foregoing petition the defendant and appellant demurred for the following reasons:

1. That said petilion and the exhibits thereto failed to state facts sufficient to authorize the writ of mandamus to issued herein.

2. That the petition seeks to compel the performance of an act on the part of the appellant which the law does not especially enjoin upon the appellant as a duty resulting from his

40 office.

3. That the petition seeks only to compel the performance of a contract on the part of the appellant.

4. That said petition seeks to compel the performance of a void contract. [Record, folio 30.]

This demur in accordance with the practice in Arizona concluded with the answer of appellant,
41 all of which was filed at one and the same time.

The answer of the appellant among other things alleged want of proper parties defendant; want of power in the Territory to hire out the convicts confined in the Territorial Prison, that had not been sentenced as a part of their punishment to hard labor, or to authorize convicts to be taken out and away from the Territorial Prison where punishment and sentence was by
42 confinement in said prison; want of power in the Board of Control to make the contract sought to be enforced; want of consideration to the Territory for said contract. That the contract sought to be enforced against the Territory is in violation of the Act of March 8th, 1895 in that said contract is for a period of over ten years, and takes the entire convict labor for that period, in violation of the provision in said act providing that said labor should not be leased

out when the same should be needed to work on
43 the buildings and premises of the Territory, thereby taking away from the Territory any right to said labor within the period of ten years. That the contract was against public policy in authorizing all the prisoners to be taken from the Prison and remain away from said Prison in many cases for the entire period of their sentence.

That the appellant, M. J. Nugent is a Terri-
44 torial officer subordinate to the will and direction of the Governor of the Territory, and that as such officer he was directed and commanded by his superior, B. J. Franklin as Governor of the Territory of Arizona, not to deliver to the appellee any prisoners out of the Territorial Prison [Record folio 44.] Alleges that the contract if enforced would increase the Thrritorial indebtedness in excess of one per cent on the taxable property of the Territory and therefore
45 in violation of the organic act, that the enforcement of said contract would interfere with the executive perogative of the Governor of the Territory and prevent the enforcement and exercise of the same and therefore void.

Alleged that the appellant had not before the commencement of this suit executed a sufficient bond or any bond for the faithful performance of said contract on its part as provided by said

Act 19. [Record page 20.]

46 On Nov. 9, 1896 after hearing, the demur of the defendant and appellant herein was overruled by the District Court, said defendant duly excepting, and the Court without any evidence being given on either side other than the pleadings, entered judgment for the complainant, and ordered, adjudged and decreed that the plaintiff had no plain, speedy or adequate remedy at law and was entitled to the writ of
47 mandamus to compel its admission to the use and enjoyments of its rights to the convict labor as by the terms of the contract set out in the complaint.

That the peremtory writ of mandamus issue, commanding and directing M. J. Nugent, Superintendent of the Territorial Prison to furnish the complainant ten able bodied male convicts out of the Territorial Prison at Yuma, on the 3rd day of Dec. 1896 at 8 o'clock a. m., properly
48 guarded, on the outside of the gate of the Territorial Prison at Yuma.

And further ordered, adjudged and decreed that the plaintiff have lief to apply at the foot of said decree, for such further writ of mandamus for other and further relief as might be meet or just in the premises. (Record, page 21, folios 47-48.)

On appeal to the Supreme Court of the Ter-

ritory of Arizona the order and decree of the
49 District Court over-ruling said demur and granting the writ of mandamus herein before stated was affirmed by final decree of said Court, and entered herein on the 26th day of January, 1897. (Record, page 28, folios 65 to 66.)

"B."

The se ond issue to be considered arises on the judgment of the District Court of the Third Judicial District of Arizona in rendering
50 judgment in favor of the complainant against the appellant herein on the answer of the appellant, which was a return to the alternative writ of mandamus, and for the purposes of this suit must be taken to be true.

SPECIFICATION OF ERRORS.

The errors of the Supreme Court of the Territory of Arizona asserted by the appellant and now intended to be urged are as follows:

1. That the said Supreme Court erred in
51 holding that it had jurisdiction of the subject matter or of the appellant herein and in affirming the decree of the District Court of the Third Judicial District of the Territory of Arizona, entered in this cause on the 9th day of Nov. 1896 for the reason, hat it appears upon the face of the pleadings that said District Court did not have jurisdiction of the subject matter or of the defendant now appellant to said action.

52 2. That said Supreme Court erred in refusing to sustain the exception taken by the appellant to the errors of said District Court, duly and properly signed in said Supreme Court, in holding that the said complainant could by mandamus or any other form of action bring suit against the Territory of Arizona without the consent or permission of said Territory, to bring such action. It being apparent that upon the face of the pleadings and the record in this case that said action, although nominally 53 against M. J. Nugent as Superintendent of the Territorial Prison of the Territory of Arizona, is in law and in fact a suit against the Territory itself.

3. That the said Supreme Court erred in not sustaining the demur of the appellant to the complaint of appellee herein and directing the Court below to dismiss said action.

4. Said Supreme Court of Arizona erred in 54 sustaining the judgment of the Court below and in holding that the contract sued on might be enforced against the Territory by mandamus without its consent to bring such action.

5. That the Supreme Court of Arizona erred in sustaining the judgment of the Court below and in holding that a mandamus would issue against the Territory to compel the specific performance of an executory private contract,

entered into between the Territory on the one
55 side and a private corporation on the o her.

6. That the said Supreme Court erred in sustaining the judgment of the Court below and in holding that the contract set out in the com-plaint shall be enforced by mandamus, enforcement of which would be to confer a special privilege on said corporation by contract, which could not be done by act of the Legislature, and therefore in violation of section 1889 of the organic act of the Territory of Arizona.

56 7. That the said Supreme Court erred in sustaining the judgment of the Court below and in thereby holding that the complainant in this action was entitled to coerce the Territory of Arizona into the performance of its contract, wherein the executive branch of the Government had declared said contract to be illegal and void, and directed its officers not to perform the same.

57 8. That said Supreme Court of Arizona erred in sustaining the judgment of the Court below in holding that the said prisoners named in the contract sued on, should be by the said defendant as the Superintendent of said Territorial Prison, turned over to the appellee herein as per its demand for the reason.

That such delivery would be to submit the said prisoners to the penalty of hard labor, when there was no judgment of such penalty

58 ever rendered against them.

Because there is no law in the Territory of Arizona, allowing any judgment of conviction to be rendered with a penalty of hard labor included therein as a part of the penalty, either in the criminal code or elsewhere, and hence appellant herein is by said judgment required to do an unlawful act toward the said prisoners in submitting them to hard labor without any law for the punishment of crime in the Territory
59 authorizing it; and without any judgment being rendered against said prisoners by the Court pronouncing the judgment of conviction against them to authorize it.

9. That said Supreme Court erred in holding that no error was committed by the Court below and sustaining its said judgment. Because it required the appellant to do an unlawful act by imposing penalty of hard labor on Territorial prisoners without lawful authority.

60 And because the contractional right of the parties to this action being of a private nature and all rights in the case sought to be enforced being purely contractional, the writ of mandamus cannot be used to enforce the specific performance of such contract, and because further that said contract shows upon its face that it was without consideration and in violation of act No. 19 aforesaid of the Terri-

torial Legislature of Arizona in the year 1895,
61 and that said contract was against public policy in taking prisoners from the prison and conveying them outside and abroad at Territorial expense, risk and trouble and thus endangering them to escape.

10. That the Supreme Court erred in holding that said contract set out in the complaint could be enforced by mandamus against the Territory without its consent, when it appears
62 upon the face of the contract itself, that the said Territory of Arizona had the right by refusing to comply with the terms of said contract to nulify and void the same.

11. That the said Supreme Court erred in not reversing the judgment of the Court below and remanding the same back to the Court below with direction to dismiss said action.

ARGUMENT.

We shall endeavor to discuss the issues in
63 this case separately in the order in which they naturally arise, noting the pertinent assignments of error. The argument will be divided under the following heads:

1. The errors of the trial and Supreme Court of the Territory in holding they had jurisdiction of the subject matter and of the person of appellant, the Territory of Arizona, without its consent.

64 2. Errors of the trial and Supreme Court of the Territory of Arizona in over-ruling the demur of the defendant, now appellant.

3. The errors of the trial and Supreme Court of the Territory in granting relief to the plaintiff now appellee and in refusing to dismiss this action against the appellant.

I.

65 The ruling by the Supreme and Territorial Court that they had jurisdiction over the subject matter and the person of the defendant and appellant herein. (Errors 1 and 2:)

A.

66 The first question which arises in this contention is who was the real party, defendant in the court below and appellant herein. Is it M. J. Nugent in his individual capacity or in his representative capacity as the Superintendent of the Territorial Prison of Arizona? The complaint alleges that as such Superintendent he has full charge and control of the prisoners confined in the Territorial Prison, subject only to the Board of Control of the Territory, and the action is to compel him as such Territorial Superintendent to deliver to the appellee ten able bodied convicts in accordance with their demand under their contract. (Record folios 4 and 5, page 2.)

67 It seems clear from the pleadings and the record that the action is against M. J. Nugent in his representative capacity and not in his individual capacity. It being against him as a Territorial officer, the action then is against the Territory through its officer, M. J. Nugent as Superintendent of the Prison. In other words, the appellee is trying to compel the Territory through its subordinate officers to perform its contract, in place of compelling the officer
68 through the Territory to specifically perform the same.

It is manifest upon this record that M. J. Nugent has no individual interest in the controversy, and that any relief sought against him in this action is only against him in his official capacity as the representative of the Territory, and that the Territory alone is to be affected by the judgment or decree which may be rendered herein.

69 If the Territory is not the real party to this action there is no party against whom the decree can be made. No person in his natural capacity is brought before the court as the defendant.

We therefore submit, that the Territory cannot be sued without its consent, and its consent having never been given in this action in any manner whatever, both the trial court and the

70 Supreme Court was without jurisdictien as to the real party appellant herein, namely, the Territory of Arizona, and for that reason had no authority whatever to enter the judgment rendered herein.

People vs. Dulany, 96 Ill. 503 on 511 and 512.

Cunningham vs. Macon & Brunswick R. R. Co., 109 U. S. 446.

In re Ayres 123 U. S. 443 and cases
71 there cited.

Hans vs. Louisiana, 134 U. S. 1 and cases there cited.

This is not a new question in this Court as was said in a former decision.

The failure of States of the Union to pay their debts and discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no state can be sued in the ordinary courts as a
72 defendant, except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations and contracts by judicial proceedings to which the State is not made a party.

IN RE AYRES, supra, page 489 the Court used the following language which is quite appropriate to the case at hand: "According to Cunningham vs. Macon and Brunswick Rail-

road Company, 109 U. S. 446 it was decided
73 that, in those cases where it is clearly seen upon the record that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The inference is that where it is manifest upon the face of the record that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State,
74 it alone is to be effected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction." The very question was presented in the case of New Hampshire vs. Louisiana and New York vs. Louisiana, 108, U. S. 76. In each of these cases there was upon the face of the record nominally a controversy between two States, which according to the
75 terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this Court: but on examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individuals citizens thereof, who had transferred their

76 claims to the State for the purposes of suit. It was accordingly unanimously held by this Court, that it would look behind and through the nominal parties on the record to ascertain who were the real parties to the suit.

The relief asked will require the officer against whom the process is issued to act contrary to the positive orders of the supreme political power of the Territory, whose creature he is, and to which he is ultimately responsible in law for what he does.

77 The Superintendent of Prison must under this order use the labor of the prisoners under his control in one way, when the supreme power of the Territory has directed him to use them in another.

The remedy sought in these proceedings to be complete would require the court to assume all the executive authority of the Territory so far as it related to the enforcement of this order

78 and to supervise the conduct of all persons charged with an official duty, in respect to the guarding and taking charge of the prisoners during the time they were required by the appellee, outside of the prison walls, and this too, in a proceeding in which the Territory is not, according the contention of the appellee, made a party.

It seems to us it needs no argument to show that the political power of the Territory cannot

thus be ousted of its jurisdiction and the judiciary set in its place.

And this was the conclusion arrived at by this Court in a case involving substantially the same questions: Hagood vs Southern, 117 U. S. page 52, on pages 67 and 68.

It is well settled law, both in England and this country that a writ of mandamus will not run against the sovereign. The reasons assigned by the English courts are that it is incongruous for the sovereign to command himself to do an act, and because in case of disobedience, the command of the writ is enforced by attachment of the person. In America the same conclusion is reached, but the reason therefor, is that because no suit can be brought against a State or Territory unless it consents thereto.

Merrill on Mandamus, section 89.

Ottawa Co. (Supervisors) vs. Auditor Gen. 69 Mich. I.

People vs. Dulaney, 96 Ill. 503 on 210-212.

II.

The rulings of the Trial and Supreme Court of the Territory in over-ruling the demur of the defendant and appellee herein. (Errors 3, 4, 5 and 7.)

It is manifest upon the face of the complaint

82 that this is an attempt on the part of the appellee to compel the Territory by mandamus to specifically peform the contract set out in the complaint by compelling the Territory, through its Superintendent of Prisons to turn out of the Territorial Prison and deliver to the appellee, prisoners from time to time confined therein as by said appellee demanded.

We think it clear that the action cannot be maintained against the Territory. The
83 judiciary cannot be brought in conflict with the executive branch of the government of the Territory and the reason is manifest. The judiciary cannot compel compliance with its orders and decrees whenever they conflict with orders of the executive. The present case is a good example of this doctrine.

Here is an order compelling the Superintendent of the Prison to turn out these prisoners to the appellee, yet the appellee has no power to
84 obtain possession of the prisoners as long as the executive refuses. The Court may bring before it the officer and commit him for contempt of Court, for not obeying his mandate, whereupon the executive can immediately pardon him, and thus even prevent a punishment.

It is the universal rule that the executive branch of the government cannot be interferred with by any decrees or judgments made by the judiciary.

85 Mandamus can never be used to compel the executive in the exercise of any of the powers entrusted to him as such, whatever the degree or character of the discretion imposed upon him. The executive and judiciary departments have seperate and distinct functions, clearly marked out, and each is independent of the other. Mandamus should never issue unless it can be enforced, for without the means of enforcement the writ would be futile.

86 B.

Mandamus cannot issue in a case where its effec· is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion.

United States vs. Blaine, 139 U. S. 306.

United States vs. Windom, 137 U. S. 636.

87 It is apparent upon the face of the complaint that the Governor in carrying out the contract which is set out in the complaint would necessarily be required to exercise discretion and judgment. He would be required to construe the contract, and if he should decide that certain provisions therein contained, were in conflict with Act 19, Laws of 1895, being the Act authorizing the hiring of the convict labor, or in conflict with the organic, or statute laws of the Territory, then it would be his province and

88 duty to disregard all such provisions. He would be required through his proper officers to determine from time to time, what prisoners in the Territorial Prison were required to perform labor upon any buildings or grounds of the Territory, including the prison buildings; while under the contract all the prison labor is leased, being in direct conflict with Section 9 of the Act aforesaid. He would also be required to determine whether the appellees had given a good
89 and sufficient bond for the faithful performance of the contract. Also whether they had given any bond, notwithstanding a recitation in the contract that such a bond had been given.

He would be required to determine whether the appellee had complied with all the terms of the contract, conceding the contract to be valid, before turning the prisoners over to them when requested, and he having exercised this discretion, and judgment in refusing to turn out
90 the prisoners, and so notified his subordinate officer, his discretion and judgment cannot be interfered with by writ of mandamus or other proceeding on the part of the judiciary.

> In Butterworth vs. Hoe, 112 U. S. 50 on 54 this court said: "For mandamus evidently will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do"

C.

91 Mandamus cannot be used to compel the State or Territory to fulfill its contract.

Section 2335, Revised Statutes of Arizona 1887, page 410 reads as follows: "The writ of mandamus may be issued by the Supreme or District court to any inferior tribunal corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from the office, trust or station; 92 or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal corporation, board or person."

Section 2336 reads: "This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law, and shall be issued on affidavit on the application of the party beneficially in- 93 terested."

It is clear from the reading of the above statute that this is substantially a re-enactment of the common law. In many of the States of this Union a similar statute has been enacted and the Courts have universally held that the writ of mandamus is limited and the sphere of its operation closely restricted by statute. That where statutes on the subject of mandamus,

94 similar to the one above referred to are in effect, the courts of the different States have as a rule held that mandamus is not a proper remedy to compel the specific performance of a contract.

In the case at bar there is no obligation upon the Superintendent of the Territorial Prison to turn out of the prison to any person whatever, any of the prisoners confined therein. The right to deliver to the appellee any prisoners contained in the Territorial Prison is given, if
95 at all, by virtue of the contract set out in the petition. There is no duty specially enjoined by law resulting from an office, trust or station, requiring the Superintendent of the Prison to comply with the request as made by the appellee. The precise question involved in this controversy has been before the Courts of different States upon similar statutes and their decisions have been uniform that the writ could not be allowed

96

State of Ohio vs. The Zanesville and Maysville Turnpike Co., 16 Ohio. State R 308 on 317.

People vs. Dulaney, 96 Ill. 503 on 510 and 512.

State vs. Republican River Bridge Co. 20 Kas. 404.

State vs. New Orleans etc R. R. 37 La. An 589.

97 To the same purport is the decision In re Ayres 123 U. S. 443 on 503.

In People vs Dulaney supra court says on page 511: "Concerning the contract of December 23, 1878, it may be said it was not so fairly obtained as that the commissioners ought to perform it. It was not made in conformity with the statute which prescribes the mode of letting convict labor, and, as we have before stated our views on this branch of the case, it will not be necessary to re-state the reasoning that led
98 to that conclusion.

"But there is another and equally conclusive reason why the peremptory writ should be denied in this case, and that is, this court has no jurisdiction by mandamus to compel the performance of executory contracts. It is an appropriate remedy to compel public officers to perform specific duties imposed by law; but that is not the case here. The duties which relator
99 asks to have the commissioner compelled to discharge arises out of the alleged contract with them. But for the alleged contract it is not claimed the commissioners owe relator any duties to be performed. It is only practicable by mandamus to compel the performance of specific acts where the duty to discharge them is clear and well defined, and when no element of discretion is involved in the performance. In the case at hand the duties to be coerced, if this

100 writ is allowed, arises out of a contract that requires a series of years for its performance, and must of necessity involve in some degree the exercise of discretion, or what is the same thing, judgment in the management of the business to which the contract refers. In such cases mandamus is not an appropriate remedy."

This case is in all respects identical with the case at bar. It was an attempt to compel specific performance of a contract for prison
101 labor similar to the one involved in this case, and we submit that the decision of the Supreme Court of the Territory should have followed this case and reversed the decision of the District Court.

III.

The decision of the District and Supreme Courts of the Territory in sustaining appellee's petition and granting the wri of mandamus on the merits. (Errors 6, 8, 9, 10, 11.)

102 The Supreme Court of the Territory so far as we are advised wrote no opinion in this case, therefore, we are not aware by what process of reason they arrived at their decision.

We will discuss this contract and endeavor to point out some of the reasons why, in our judgment, the contract is illegal and void as against the Territory (although we are mindful of the fact that mandamus is not the proper proceed-

ing to try such questions.)

103 The only authority on the part of the Territory of Arizona to make this contract is contained in Act 19, Laws of 1895 above referred to. This statute defining the duties of the Board of Control is a limitation upon the powers they may rightfully exercise. It being declaratory, as to the manner of making contracts by these offices for that purpose, it is to be considered as an inhibition on such offices as to the making of
104 such contracts, in any other manner or mode and for any other period or time, or for any other purposes than in such Acts designated, and if the contract in question contains provisions or is for a different length of time than that authorized in the Act, then the contract is without sanction of law and is not binding upon the Territory.

Section 9 of the Act aforesaid provides among other things that the inmates of the Territorial
105 Prison shall not be leased when the labor of said inmates is required upon any buildings or properties of the aforesaid institution.

One of the very first provisions in the contract is that all the labor of the male convicts now in the Territorial Penitentiary or who may hereafter be confined therein, are leased to the appellee for the term of ten years from date of said contract. (Page 4 of the record.)

106 This is clearly in violation of the provisions of Section 9 aforesaid, for the reason that it cannot be determined by the Territory, that for the ten years none of the labor of the Territorial Prisoners shall ever be needed or required upon any of the buildings or properties of the Territory, yet this contract seeks to put it beyond the power of the Territory to ever have the use of such labor upon any of its property during that period.

107 This contract also attempts to, and does in fact, lease all of the male convicts now in the Territorial Prison to the appellee for ten years irrespective of their sentence, whether it be for a shorter or a longer time than that specified in the contract. This clearly is beyond the power of the Territory to lease convict labor of the Territory for a longer period than that for which the prisoners are sentenced.

108 (Section 9 of the Act aforesaid authorizes the making of contracts or lease not exceeding ten years from the date of their execution, while the contract in question is for a period of ten years from the time when the appellee may complete the construction of its canal and turn water upon the lands of the Territory, the commencement of which shall not be to exceed four years from the date of making the contract. In other words the contract in terms is for a longer

period than ten years and is therefore void for
109 that reason.)

The provisions in the contract which authorize and permit the Territorial prisoners that were confined in the Prison at the date of making of said contract, and prior to the passage of Act 19 aforesaid, to be taken from the Prison to a great distance from the Prison so as to prevent the return of the convicts at night and there working them at hard labor, we submit,
110 is clearly an Ex Post Facto law and submits the prisoners then sentenced to imprisonment in the Penitentiary, to other and different punishment than that for which they had been sentenced or could have been sentenced at the time of the commission of the crime for which they were sentenced, and so far as that provision is contained it is clearly void.

In King vs. Missouri, 107 U. S. page 221 this Court held: "That any law passed after
111 the commission of and offense which, in relation to that offense or its consequences, alter the situation of the party to his disadvantage, is an Ex Post Facto law," and void.

To the same offect is the case IN RE Medley, 134 U. S. page 160.

It is also expressly provided in Act 19 aforesaid that a good and sufficient bond must be given by the person or persons leasing the labor

112 of the convicts of said Territory for the faithful performance of said contract, said bond to be approved by the Board of Control.

This contract on its face recites: "That the appellee herein having submitted his good and sufficient bond for the faithful performance of this contract, which bond has been approved by the said Board of Control and each of its members, is herewith delivered and accepted."

113 This precise question was raised by the pleadings that no bond whatever had ever been given. And it was taken, as we understand the matter, for granted that no bond had been filed. This however, is the fact and at the present time no bond has been given.

Why this provision should have been incorporated in this contract we are at a loss to know, unless the contract was prepared with the intention of submitting a bond prior to its execution.

114 It is apparent from the reading of this contract that all the provisions, so far as binding the Territory to perform the acts by it to be performed are mandatory as against the Territory, but no provision is contained as binding whatever on the appellees to do or perform any act.

Shortly after the making of this contract by the Governor of the Territory, it appears upon the record that another Governor was appointed

in his place, namely Gov. Franklin, and he is
115 the Executive who refused to carry out the provisions of this contract, or in any way consider it binding upon the Territory.

The contention on the part of the Territory is that there is no consideration whatever for the contract and that it is such a contract as would not be enforced in equity between individuals and is clearly within the decision of People vs. Dulaney, 96 Ill. 503 on 510.

116 A contract which authorizes the appellee to take out five convicts at a time and to take them at a great distance from the Territorial Prison and there be guarded, kept and maintained, for the purpose of doing work under the direction of the appellee would, of itself, create an extra and additional expense, to guard and provide for these prisoners while doing this work, more than the income to be received therefrom, even if this income was to be paid to the Territory in
117 money, but there is no provision in the contract by which the appellee ever agreed to pay anything for this labor. The nearest they come to making any stipulation is that they will pay seventy cents per day for each day's labor, and pay for it in water rights at the rate of $20 per acre when a proposed canal by them to be hereafter built shall be completed, but no agreement or statement or stipulation that they will ever

enter upon the construction of the said canal or ever complete it.

The Territory also claims that they have the right to forfeit this contract under the provisions contained on page 6, folio 13 of the record, where it is provided that the continuance and maintainance of this contract by the party of the first part, meaning the Territory or its successors, during its entire term, is of the essence thereof, and that the right and privileges which acrue to the Territory hereunder, should be subject to and contingent upon its full, entire, faithful performance, and shall be forfeited and defeasible in the event of any substantial, persistent or wilful breach thereof.

The Territory therefore contends that it had the right at any time to refuse to carry out the contract by forfeiting all rights which might acrue to it by the performance of the same, and thereupon the contract ceased and determined, the Territory having elected to terminate the contract before anything had been done on its part, the asme became and was thereafter of no validity whatever.

We therefore confidently submit that upon the record, the judgment of the Supreme Court of Arizona should be reversed and the case remanded with directions to the court below to dismiss this action.

Respectfully submitted,

121 CHARLES F. AINSWORTH,
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and L. E. PAYSON,
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